Trimhua Shipping Sdn Bhd v Owners of the Ship 'Johan'

HIGH COURT (KUCHING) — ADMIRALTY IN REM NO KG 1 OF 1991
HAIDAR J
12 SEPTEMBER 1991

Shipping and Navigation *— Practice — Stay of proceedings — Action in rem — Plaintiff's refusal to provide security for defendant's counterclaim — Application by defendant for stay pending security — Whether court had discretion to grant stay pending security — Rules of the High Court 1980 O 70 r 26*

Shipping and Navigation *— Practice — Action in rem — Application for stay of proceedings pending security — Power of court to merely order security be given — Rules of the High Court 1980 O 70 r 26*

The plaintiff had a claim against the defendant arising out of a collision between the defendant's ship and the plaintiff's ship. The defendant had filed a defence and counterclaim. The plaintiff arrested the defendant's ship and obtained security for their claim. The defendant asked for security for their counterclaim but the plaintiff refused. The defendant thus filed this application for a stay of proceedings until security was provided on the basis of O 70 r 26 of the Rules of the High Court 1980 ('the RHC'). The plaintiff objected on the ground that the said provision only permitted applications for stay when there was already existing an order for security.

Held, allowing the application:

(1) The court had no power under O 70 r 26 of the RHC to merely order security to be given but it could in a proper case grant a stay until security is given. Such an order of stay should be subject to terms as it cannot be left in a vacuum.

(2) Here, the plaintiff's only ship had sunk and it had a share capital of only $250,000. The defendant had provided security for the plaintiff's action. In the circumstances, this was a proper case for the court to exercise its discretion to order a stay of the proceedings pending the provision of security by the plaintiff on the counterclaim.

[Bahasa Malaysia summary

Plaintif ada suatu tuntutan terhadap defendan yang timbul daripada perlanggaran antara kapal defendan dan kapal plaintif. Defendan telah memfailkan suatu pembelaan dan tuntutan balas. Plaintif telah menahan kapal defendan dan memperolehi jaminan bagi tuntutannya. Defendan telah meminta jaminan untuk tuntutan balasnya tetapi plaintif enggan memberinya. Defendan oleh itu memfailkan permohonan ini untuk penggantungan prosiding sehingga jaminan diberi berdasarkan A 70 k 26 Kaedah-Kaedah Mahkamah Tinggi 1980 ('KMT'). Plaintif telah membantah atas alasan bahawa peruntukan

tersebut hanya membenarkan permohonan untuk penggantungan apabila sudah pun wujud suatu perintah bagi jaminan.

Diputuskan, membenarkan permohonan itu:

(1) Mahkamah tidak berkuasa di bawah A 70 k 26 KMT untuk hanya memerintahkan jaminan diberi tetapi ia boleh di dalam kes yang sesuai membenarkan suatu penggantungan sehingga jaminan diberi. Perintah penggantungan sedemikian seharusnya tertakluk kepada syarat-syarat kerana ia tidak boleh dibiarkan secara berasingan.

(2) Di sini, kapal plaintif yang tunggal telah karam dan ia mempunyai modal saham sebanyak hanya $250,000. Defendan telah memberi jaminan untuk tindakan plaintif. Dalam keadaan begitu, ini adalah kes yang sesuai bagi mahkamah menggunakan budi bicaranya untuk memerintahkan suatu penggantungan prosiding sementara menanti pemberian jaminan oleh plaintif atas tuntutan balas itu.]

Cases referred to

1 *'The Alexander'* (1883) 5 Asp MC 89 (folld)
2 *'The Neptune'* [1919] P 17; 88 LJP 94 (folld)
3 *'The Eleftheria'* [1969] 1 Lloyd's Rep 237; [1970] P 94; [1969] 2 WLR 1073; [1969] 2 All ER 641 (folld)
4 *'The Carl Offersen'* [1979] 2 MLJ 55 (refd)

Legislation referred to

Rules of the High Court 1980 O 70 r 26

Chong Siew Chiang (*Chong Brothers Advocates*) for the plaintiff.
SY Chan (*Ee & Lin Advocates*) for the defendant.

Cur Adv Vult

Haidar J: In this admiralty action in rem the plaintiff, as owners of the ship Seng Soon Chew, claim, inter alia, damages caused to its ship as a result of a collision with the defendant's ship Johan Pearl on 5 December 1990 in the South China Sea. The defendant filed a defence as well as a counterclaim to the plaintiff's claim. Both parties are within the jurisdiction of the court.

The plaintiff arrested the defendant's ship Johan which was subsequently released on 28 January 1991 following security being given by the defendant in the form of a bail bond in the sum of $1.5m given by the defendant's surety, Standard Chartered Bank (see encl 19). The defendant instructed its solicitors to ask the plaintiff for counter-security in the sum of $1m by way of a guarantee by the plaintiff's P & I Club (if any) or by a reputable bank or insurance company (see exh 'B' to encl 39) in respect of its counterclaim. The plaintiff refused to give the counter-security (see exh 'C' to encl 39). As a result the defendant filed on application by way of summons-in-chambers on 28 March 1991 (encl 39) under O 70 r 26 of the Rules of the High Court 1980 ('the RHC') for an order of stay of the proceedings until security by way of a non-revocable banker's guarantee in the sum of $1m or such sum as the court deems fit is given by the plaintiff

to the defendant pending determination of the defendant's counterclaim in this action or by way of the plaintiff paying into court the sum of $1m or such sum as the court deems fit and for a further order that if the security deposit aforesaid is not given within seven days or such time as the court deems fit, the plaintiff's action shall be dismissed with costs to the defendant. The application is supported by the affidavit of Geoffrey Teo, the director of the defendant company. The plaintiff filed an affidavit in opposition through its counsel (see encl 55). The main ground of the defendant's summons-in-chambers is that the plaintiff's ship Seng Soon Chew has sunk and there are no other sister ships or assets of worth in the plaintiff company. According to a search at the company registry the plaintiff has only a share capital of $250,000 and it is alleged that once the plaintiff received from its insurance the compensation for total loss of the ship Seng Soon Chew there is every likelihood that the plaintiff company might stop carrying on its business. Apart from denying the allegation that the plaintiff company may cease operating its business once it received the compensation money, the plaintiff's opposition to the summons-in-chambers is grounded primarily on procedure, that is, the defendant presupposes that an order for security has already been granted which in fact is not the case. It is then pertinent, in my view, to examine the relevant order on which the defendant relies in its application before the court.

Order 70 r 26 of the RHC reads:

> Where an action in rem, being an action to enforce any such claim as is referred to in Order 11, rule 1 (1) (i) (ii) and (iii), is begun and a cross action in rem arising out of the same collision or other occurrence as the first mentioned action is subsequently begun, or a counterclaim arising out of that occurrence is made in the first mentioned action, then —
>
> (a) if the ship in respect of or against which the first mentioned action is brought has been arrested or security given to prevent her arrest; but
> (b) the ship in respect of or against which the cross action is brought or the counterclaim made cannot be arrested and security has not been given to satisfy any judgment given in favour of the party bringing the cross action or making the counterclaim.
>
> *the Court may stay proceedings in the first mentioned action until the security is given to satisfy any judgment given in favour of that party.* (Emphasis added.)

It would seem clear from the provisions of O 70 r 26 of the RHC, the facts as submitted by counsel for the defendant, with which I agree, that the defendant has satisfied the requirements of the said order. In other words, it would seem to be undisputed that the court has a discretion to make an order of stay in the circumstances of the case but according to counsel for the plaintiff the said order merely relates to stay, *not security*. However, in my view, the wording of the said order as emphasized by me above would seem to show that security is to be given if an order of stay of proceedings is made by the court. The counsel for the plaintiff further submitted that as no order for security has been granted yet and no application for security has hitherto been made, the application is improperly placed before the court and further alleged that the defendant seeks an easy way out and try to obtain an order of security without placing the issue of security before the

court. Hence the plaintiff claimed that it is an abuse of the process of the court. He relied on O 23 (relating to security for costs) and O 74 (relating to security for claim). He further submitted that the only law which empowers the court to order for security before judgment is the Debtors Act 1956. With respect, I do not agree with such a contention as we are dealing with an order of stay pending security being given and not security per se. This is an action in rem and not in personam. The orders relied on by the plaintiff, to my mind, are therefore irrelevant.

I agree that the court has no power under O 70 r 26 of the RHC to merely order security to be given (see *'The Alexander'*[1]) but it can in a proper case grant a stay until security is given. According to Hill J in *'The Neptune'*[2] at p 96:

> ... the court has no power to compel the giving of bail. At the most, in a proper case, it can either order the arrest of the ship or grant a stay until bail is given.

In this case the arrest of the plaintiff's only ship Seng Soon Chew is out of the question as it has sunk and the question is whether this is a proper case for an order of grant of stay until bail is given. In my view an order of stay if granted by the court should be subject to terms as an order of stay alone cannot be left in a vacuum. In *'The Eleftheria'*[3] at p 246, Brandon J said:

> The question whether to grant a stay or not, and if so on what terms, is one for the discretion of the court. Having arrived at the clear conclusion which I have stated, I shall exercise my discretion by granting a stay, subject to appropriate terms as regards security.

'The Eleftheria'[3] was quoted with approval by Chua J in *'The Carl Offersen'*.[4]

In my view, O 70 r 26 of the RHC and the authorities clearly give the discretion to the court in a proper case to make an order of stay pending security being given. The plaintiff did not dispute that its only ship Seng Soon Chew has sunk and it has only a share capital of $250,000. If the plaintiff has any other ships then the defendant could properly apply for the arrest of the ships as security. The defendant has provided the necessary security for the plaintiff's claim. In the circumstances, it would appear that the defendant is entitled to apply for stay until security is given as provided under O 70 r 26 of the RHC. The defendant here is not merely asking for security to be given as seemed to be the contention of counsel for the plaintiff.

Having considered the circumstances of this case I am of the view that this is a proper case for the court to exercise its discretion to order a stay of the proceedings pending security being given by the plaintiff on the counterclaim. I therefore order that further proceedings of this action be stayed until the plaintiff provide a reasonable security to the defendant on its counterclaim. In the absence of any evidence, it is best that I leave to the parties to work out the reasonable security. In the event of a failure to reach agreement on the reasonable security the parties are at liberty to apply to the court for direction. Costs of the application to the defendant.

Application allowed.

Reported by S Surenthiraraj